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IN THE

Supreme Court of the United States

October Term 1966

No. 92

ROLAND CAMARA,

Appellant,

v.

THE MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Appellee.

BRIEF OF HOMEOWNERS IN OPPOSITION TO HOUSING AUTHORITARIANISM, *Amicus Curiae*

Interest of the AMICUS, and its Objectives as an Organization

> *As in all Utopias, the right to have plans of any significance belonged only to the planners in charge.*
>
> —JANE JACOBS

Frank of *Frank v. Maryland*,[1] was in a position to be but little affected, ultimately, by the decision in his case.[2] But this *amicus* was gravely affected. Slum land-

[1] 359 U.S. 360, 79 S. Ct. 807

[2] "[An external inspection revealed the Frank house to be] in an 'extreme state of decay,' and . . . in the rear of the house there was a pile later identified as 'rodent feces mixed with straw and trash and debris to approximately half a ton.'" 79 S. Ct. at 806. Had a warrant been required for entry and search, it is submitted that it would clearly have been obtainable.

lords were also affected—they were assisted, in a way which will be argued below; as were building enforcement officials, to a minor degree. Also affected was the very subjective, and statistically difficult to analyze, but economically and socially important matter of the psychological impact of *Frank* on the future of cities as cities. Atmosphere, or "ambiance," as it is presently popularly denominated. However called, the phenomenon has been spoken of since time-out-of-mind by poets, chroniclers, and sociologists—from the poets and chroniclers of the Bible and before, through the modern poet-chronicler-sociologist Jane Jacobs.[3] It is an "ambiance" much affected by the *Frank* case.

"Homeowners in Opposition to Housing Authoritarianism" (HOOHA) is a citizen's organization formed and active in Baltimore, home of the *Frank* case, since 1962. The membership of the organization is not large—not over sixty, not under fifty—but its influence, it believes, and its following, is large, so that it has been cited with some frequency in discussions of matters related to "inner city" homeowners' problems.[4]

The group is composed entirely of homeowning residents of Baltimore City, mostly in what has come to be called "the inner city." Though membership is not exclusive on any basis, the special appeal of HOOHA is not to the slum dweller, who has separate problems which are well recognized by government and society, and which are within the compass of myriad bodies,

[3] The Death and Life of Great American Cities. New York, Random House (1961).

[4] Among others, The Wall Street Journal, March 24, 1964; Architectural Forum, May, 1964 pgs. 9-10; 78 H. L. Rev. 801, at 858, ftnt. 293; and in the local Baltimore press, which has not only devoted news-article attention to HOOHA, but has made it, and its positions, the subject of several editorials.

both governmental and private. Rather, its appeal has been to those persons who have selected for themselves and their families, as a matter of voluntary choice and preference, city life, with its disparate rewards, meanings, beauty, values, virtues, textures and conditions, in preference to a life in, and dedication to, the falser standards, and fainter conditions, the monotony and the bathos, of life in suburbia. Composed largely of family people with children, of professionals or spouses of professionals, and having members in such fields, among others, as journalism, science, art, the concert stage, medicine, law, and writing, the organization is yet not a society of detached *literatti*.

Rather, as its battle cry and slogan indicates (BURHA[5] go home!), its bent is more in the direction of activism than not, and one of its purposes has always been the importuning, education and enlightenment of City Councilmen, state, BURHA, and occasionally federal bureau of roads, people, upon subjects concerning home ownership and city living. Particularly as concerns city living in strong, economically viable, city neighborhoods. Let it be said that "self-protecting" means from unwanted encroachment on private desires and standards by government officials. It does not mean, and has, no racial implication whatever. HOOHA's members are in the main from integrated communities, and accept as a way of life and a natural concommitant of city living, racial integration, and frequent mixed social contacts. *None* of this organization's problems or goals have to do with color or segregation.

Specifically, HOOHA was formed to do battle in every arena—political, judicial, and educational, among others—against compulsory door-to-door inspection and

[5] Baltimore Urban Renewal and Housing Agency.

forced "upgrading" of private, owner-occupied homes or apartments, as to matters not overtly affecting the public weal.

HOOHA believes in the contrary—that the private homeowner has the right to the undisturbed enjoyment of his own premises, to the management of his own budget, and to the free expression of his own esthetic choices; rights which frequently run at cross-purposes to city inspection goals and standards, while not touching at all upon questions of health, welfare and safety.

It is HOOHA's purpose, then, to support and defend not only its own members, but every homeowner, including those who are small, or in straitened economic circumstances, or who are inarticulate, or are otherwise not equipped to deal with the callousness and coldness of powerful governmental representatives when these representatives are so often themselves well-equipped with gall, or ill-equipped with sympathy, esthetic sensibility, or even intelligence and conscience.[6]

---

[6] "Budgetary limitations also preclude payment of salaries that will attract highly qualified [inspection] personnel . . . One neglected aspect of inspector training is . . . public relations techniques." *Enforcement of Housing Codes,* 78 Harv. L. Rev. 805.

"In Baltimore, Md., strong homeowner opposition to code enforcement and urban renewal began when inspectors indelicately threatened to compel homeowners to make what the owners considered minor repairs and aesthetic changes. Interview with Member Homeowners in Opposition to Housing Authoritarianism (HOOHA), Baltimore, Md., August 26, 1964." *Enforcement of Housing Codes.* 78 H.L. Rev. 858 n. 293.

The data gathered in this article by a group of 3rd and 4th year Harvard law students is interesting, though the article frequently outrages the reader's sense of humor as far as interpretation by the young men of their data is concerned. E.g. (at 811): "[T]he only *feasible* way to obtain compliance [with Housing Codes] *when the culprit cannot be discovered* is to charge the landlord with responsibility." (Emph. supp.)

The organization believes that with the tremendously increased social and economic pressures which have of late come to bear upon American cities, and upon life in modern civilization in general, the private home is the last sanctuary of rest and repose. And so it is the hope of this group that it may prevail upon the Court to return to its members, and to every inner-city resident trying to make a home under difficult conditions, some degree at least, of the safety and sanctity which their residences had, in the eyes of the law, before *Frank*.

SUMMARY OF ARGUMENT

Frank v. *Maryland* cannot be reconciled, on historical terms, with the antecedent roots of the Fourth Amendment. Insofar as *Frank* was based on history, it was in error.

Legal precedent, particularly *Boyd v. U.S.*[7] which was relied on in *Frank* fails to uphold the Court's view as expressed in *Frank*, especially when applied to private, owner-occupied residences. In this respect, at least, it is argued, *Frank* should be overruled.

There is no distinction in history, precedent, or logic upon which entry for general public welfare purposes into private premises can be distinguished from entry to search for evidence of criminal activity, nor should there be.

The vitality and progress of urban societies and cities depends not on broadening the right of governmental agents to enter private premises, but on narrowing it; narrowness is dictated by the spirit of the Fourth Amendment as well as its obvious letter.

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[7] 116 U.S. 616. 29 S. Ct. 749 (1886)

ARGUMENT

History

History was applied to the *Frank* decision by the Court.

The history cited was misread, it is respectfully urged, if (1.) writs of assistance and general warrants are as objectionable as searches without warrants—which assumption certainly cannot be disputed—and, (2.) if customs, revenue, and excise searches can*not* be distinguished—or could not have been distinguished in the colonial context—from health and general welfare searches in the context of the modern city.

If however, the distinction fails between the old revenue, and modern health searches, then history is on the side of the Appellant herein, and *Frank* was, insofar as the distinction does fail, in error.

But the question of whether there can be such a distinction, itself is entangled with the question of *what the history —of the Fourth Amendment—is.*

Therefore the Court is respectfully referred to Appendix A hereof, in which are reprinted extensive excerpts from *"The History and Development of the Fourth Amendment to the United States Constitution,* by Nelson B. Lasson, Series LV Number 2, The Johns Hopkins University Studies in Historical and Political Science, (1937). Lasson's work is a brilliantly composed compendium, interpretation and analysis, based principally upon the primary sources, of the historical roots, to the tenth century and beyond, of the sturdy tree of the Fourth Amendment.

Not only are the principle buttresses of the Opinion in *Frank* discussed by Lasson—*Entick v. Carrington, The North Briton Number* 45 incident, and Wilkes, and Pitt—but the later, contextually more prominent series of searches, seizures, riots and rescues in the colonies, which

directly anteceded the adoption of the Fourth Amendment are collected and disclosed in Lasson.

It is respectfully suggested that this history grants more—far more—than *Frank* would admit.

Thus, the antecedents of the Fourth Amendment are found in the outrage and reaction engendered over centuries, first by injustices rendered in the name of general warrants, then by writs of assistance. In all of the important instances, the purposes of the writs and the warrants related to civil confiscations of goods, *or* to search for evidence of crimes; sometimes the one and sometimes the other.

In Lasson's work (Appendix A), he leads one, in a careful, scholarly manner, it is suggested, to conclude that contrary to the characterization of events set forth in *Frank*, it was historically *never* conceived that a man's house was his castle as to crimes, but not as to civil trespass or other unasked investigations; nor was a distinction *ever* understood to exist between some violations of the sanctity of a home's four walls, and other such violations; nor that the rights of private residence could be violated in the name of the general welfare, but not in the name of a search for criminal evidence. Such a conception—that there is a distinction between searches in investigation of crimes, and for other purposes, at least upon examination of history—appears but to have sprung full blown from the brow of this Court in 1959.

The distinction seems to have been based, in *Frank*, on the idea of a "bolstering" of the Fourth Amendment by the Fifth. But the Fourth was historically recognized as being based on an inherent, fundamental, right, and it has, it is respectfully submitted, a vitality of its own, all unaided by the Fifth, as is expounded by the *facts of history* discussed in Lasson.

... Early Maryland Statutes Cited in FRANK

In *Frank* the Court cited also a number of early Maryland statutes (359 U.S. at 809-10) giving the right of search without warrant in tobacco, food and revenue cases. The Court overlooked, or did not explain the fact that these cited statutes *all preceded* the adoption of the Fourth Amendment (1789). Many of these statutes, also, *preceded* most of the furor and outrage engendered by the writs of assistance.[8] Moreover, Maryland has the deplorable distinction, among the colonies, of having had the earliest of the writs of assistance[9]—a fitting prologue to its being the situs of the *Frank* case—so that it can just as well be said that the import of the history of the early statutes is to show as a motivation *a striking down,* or an expression of a change of policy in Maryland's ratification of the Fourth Amendment.

... The Reliance, in FRANK on the Boyd Case and Old Statutes

Nor does the Opinion in *Boyd v. U.S.*, 116 U.S. 616, 29 S. Ct. 749 (1886) much substantiate, it is respectfully suggested, the reading given it in *Frank.*

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[8] E.g. LXXXIII (Laws November *1773* c.l); Laws *1717* c.VII; Laws *1715* c. XLVI; May *1756* p. 5 Sec. LVI; March *1758* p. 3 Sec. X., *Frank*, 359 U.S. at 809-10.

[9] N. 20, p. 55, Lasson: An examination of the Maryland Archives reveals a colonial writ of assistance of an earlier date than any the writer has seen mentioned before. This writ was issued by the Council of Maryland to Patrick Mein, Surveyor General of the Customs in Virginia and Maryland, on November 10, 1686, in response to his request for a writ of assistance "as is usual in such cases." The writ, however, did not recite any general powers of search and its sole purpose was to command assistance, but the fact is evident that the recitation in Mein's commission of general search powers was taken by everyone concerned to be of itself sufficient authority in this regard. Indeed, the commission itself reads like a general writ of assistance. Archives of Maryland (Baltimore, 1887), V, 521-524.

The statute in question there was termed,

> "(T)he first Act in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the Act under which the obnoxious writs of assistance were issued did not go as far as this, but only authorized the examination of ships and vessels and persons found therein, for the purpose of finding goods prohibited . . . , and to enter into and search any suspected vaults, cellars, or warehouses for such goods. . . .
>
> " . . . (B)y the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property." 29 S. Ct. at 748.

Likewise, in the present case (even, it is realized, as in *Frank*), the Appellant was coerced to allow officials to enter his private residence, by liability to a penalty for non-compliance.

The Court also said, in *Boyd*,

> "The principles laid down in ['Lord Camden's memorable discussion . . . (in) *Entick v. Carrington*'] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to *all* invasions, on the part of the Government and its employees, *of the sanctity of* a *man's home and the privacies of life.* It is not the breaking of his doors and the rummaging of his drawers that constitutes the essense of the offense; but it is the invasion of his *indefeasible right of personal security, personal liberty and private property* . . . it is the invasion

> of this sacred right which underlies and constitutes the essence of Lord Camden's judgment." (Emph. supp.)

Then, in the next sentence, the Court states,

> [C]ompulsory extortion . . . of private papers to be used as evidence is condemn[ed] . . . In this regard the Fourth and Fifth Amendments *run almost into each other.*" (Emph. supp.)

Furthermore, the Court in *Boyd,* at 752, in stating that "'The unreasonable searches and seizures' condemned in the Fourth Amendment are *almost always* made for the purpose of compelling a man to give evidence against himself," clearly indicates, one would think, that there are *other* kinds of searches which are unreasonable as well.

But the Court in *Boyd, did not* say that Lord Camden's principles laid down in *Entick, only* apply where self-incrimination is involved. The Court did *not* say, nor imply, that the Fourth Amendment is operable *only* when the Fifth is violated. It did *not* say that the *only* unreasonable search is one in which self-incrimination is involved.

In *Frank* this Court held otherwise-substantially misinterpreting *Boyd.* This *amicus* hopes, and urges, that *Frank* be overruled.

Frank was based entirely on the proposition, it is submitted, that any search is *reasonable* where "No evidence for criminal prosecution is sought to be seized" (at 359 U.S. 366). *Boyd* did not so hold. Lord Camden did not so hold. Gray, in the famous Appendix to Quincy did not so hold. Patrick Henry, Madison, Adams and Otis did not so hold.

In fact the *purpose* of the official intrusion has, it is submitted, *no* bearing on the Fourth Amendment. An unreasonable search is one conducted in private residential premises, without a warrant, for any reason other than the exceptional or emergency circumstances such as are spoken of in the dissent in *Frank* at p. 380 of 359 U.S. A search of a vessel, of a man seized in hue and cry, or inspection of "ships and carriages" (*Frank* p. 367), *might* be a reasonable search without a warrant. But not of private premises after the adoption of the Fourth Amendment.

The Court's reference at p. 369, to Maryland statutes of 1782 and 1787 empowering Commissioners to enter on private "lots, grounds and possessions" . . . to repair common sewerage systems and to keep roads in repair are in the nature of eminent domain statutes, and if, *arguendo,* they are constitutional, they yet do not solve the present question of *searches* of private premises to discover building code violations. They are statutes which *even if* constitutional, and that is doubted, should be decided according to the rationale of *eminent domain,* and *not* of search and seizure.

Nor was the Court correct in *Frank* at p. 369 in citing a 1789 statute permitting seizure of bread deficient in weight or fineness, as an example of a statute permitting entry into any private home. Though the Court's clear implication seems to be that the statute permitted this, that statute, on the contrary seems to permit entry only in the case of persons making or offering bread *for sale.* To imply that it applied to every householder who did not make bread for sale to the public, and not just to bakers, is to seriously strain the import of that early Act. It is reprinted in Appendix B.

Besides this Bread Act antedates the adoption of the Fourth Amendment by some months.[9A]

Other Considerations; Resident Owners Do Not Cause Slums

This *amicus*, along with Professor Martin Anderson[10] and others, are disappointed that from many viewpoints, and frequently in the most important respects, federal urban renewal programs have been usually, dismal failures.

Others, mostly non-resident monetary beneficiaries of urban renewal programs, it must be said, or those living far away from the projects in sheltered suburbs, contend just as strongly that the programs have been fully successful.

This dispute cannot, of course, be settled within the judicial confines of this case, and of course, the dispute is fully irrelevant to the case, except that, hovering over all is the constant contention of inspecting officials that all of their programs—of zoning control, of health, fire and building code enforcement, of urban "renewal" and slum "eradication"—will collapse entirely without the right to inspect private residential premises without a warrant.

Aside from the inapplicability of this plea as a validating constitutional argument, this *amicus* (and the cumulated in-city residence experience of its members is quite large), respectfully contends that as an argument, it simply is *not factually true.* The resident owner is

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[9A] Lasson, *op. cit.* p. 104, states "[Rhode Island] adopted the Constitution by a vote of 34 to 32 in May, 1790. The legislature later ratified the proposed amendments. Rhode Island being the ninth state to ratify, the amendments thereupon became a part of the Constitution." See also p. "App. 22," of Appendix A.

[10] *The Federal Bulldozer,* Martin Anderson. Massachusetts Institute of Technology (1964).

not a causative factor in the creation of slums, or their maintenance, and probably never has been.

Baltimore is a city of homeowners. Among the large cities of the country, Baltimore is in the upper reaches in the ratio of owner-occupied dwellings to non-owner occupied.[11] Under the cover of a benevolent "ground rent" system it has almost always been so, in the city's long history.

Baltimore's owner occupancy has been long reflected in vast blocks of neat row houses within the city, with matching rows of scrubbed marble steps quarried from the nearby Beaver Quarries, with well-kept yards, clean streets and clean alleys.[12]

With the well known and well documented national population flow of the past two and a half decades, of course, much of this has changed. With an inflow of population from rural areas, and an outflow from city to suburb, slums have grown and spread in the older sections of town, in Baltimore, as elsewhere. But not entirely. In Baltimore a number of huge, neat, white-marble-step, middle class, owner-occupied neighborhoods have held, intact. Other neighborhoods—Bolton Hill, Tyson Street (like Washington's Georgetown), have not only improved themselves, but have stepped up the

[11] 1960 census figures show the following percentage of owner-occupied dwelling units in the nation's eleven largest cities, and some others chosen at random: Manhattan 21.8%; Chicago 34.3%; Los Angeles 46.2%; Philadelphia 61.9%; Detroit 58.2%; *Baltimore* 54.3%; Houston 60.4%; Cleveland 44.9%; Washington, D.C. 30.0%; St. Louis 38.2%; Milwaukee 48.4%. (Foregoing are eleven largest cities, in order, with Manhattan chosen as representative of New York.) Also, Boston 27.3%; San Francisco 35.0%; Fort Worth 65.5%. All figures are from U. S. Census of Housing (1960), City Blocks. Bureau of the Census Series HC (3). Table 1, p. 1 for each city.

[12] See *Sunday Sun Magazine*. Article by John C. Schmidt, Feb. 17, 1963.

scale—even as Georgetown—to something other than middle class.

None, or very little of this neighborhood holding, or improvement, has been due to governmental programs of area code enforcement, slum clearance, urban renewal or rehabilitation. These programs basically are not, nor have they ever been, designed for maintaining neighborhoods where the strong impetus of *home ownership* already exists.

It is when the homeowner flees, that the slum spreads.

But the government agents under governmental programming and bureaucratizing come anyway, into owner-occupied homes, prying, peering, carping.

Frequently these inspectors do not themselves live in city areas, and do not understand the reason why anyone else would live in a beleaguered in-town area, especially areas being pressed by slums. Suburbia they understand. Little League and Beltway they know. Formstone,[13] they appreciate. But the "townhouse" they do not know, thirteen-foot ceilings, graceful staircases, walled gardens, pine flooring, velvety patina-ed old brick facades, carved stone cornices, they do not know.[14]

The reaction of the inspector to the home-owning city dweller is likely to be akin to that described by Emerson:

> They are lonely; the spirit of their writing and conversation is lonely; they repel influences; they shun general society; they incline to shut themselves in their chamber in the house . . and to find their tasks and amusements in solitude. Society, to be sure, does not take this very well; it saith, Whoso goes to walk alone, accuses the whole world; he

[13] T.M. Reg.

[14] See fnt. 6.

declares all to be unfit to be his companions; it is very uncivil, nay, insulting; Society will retaliate.[15]

Here the Two Cultures clash.

An example of the seriousness of the clash may be found in this nearly direct quotation from an editorial in the Baltimore Sun:

> A proposed new Housing Code for Baltimore City, at this writing still pending before the City Council will provide that "every dwelling" in the city be kept in "good repair." Some items are listed in the Code to indicate what is considered "good repair," such as all windows clean and no loose wallpaper or flaking paint, but the Code says that "good repair" is not limited to the enumerated standards. The actual working definition of what this may mean is left up to a *committee* composed of the chief inspector, the fire chief, the urban renewal director and the health commissioner, who are given very broad rule making power—"such rules as they may deem necessary and proper"—Thus to reduce the law to its essence: every homeowner in Baltimore would be required to keep his property in whatever condition is considered fitting and proper at any given time by four city officials, and anyone guilty of violating the rules or regulations would be liable to a fine of up to $300 for each day.[16]

This is no way to revitalize a city, to invite cultured, or educated, or concerned, mature people to come live in it, nor is it a way to convince them not to leave. To turn loose upon them masses of petty officials, to disrupt their lives, pursuits and pleasures, with rules, with findings, with inspections, and tyrannies, is madness—economic, sociological, psychological and jurisprudential.

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[15] Emerson, *The Transcendentalist,* in Selections from Ralph Waldo Emerson 198-99 (Whicher ed. 1960).

[16] The Sun, Baltimore, May 23, 1966, Editorial, "Good Repair."

Furthermore, inspection of owner-occupied dwellings distracts attention from the more difficult problem—for the inspector—of running to earth the offenses of the absentee landlord, and of the teeming slum in the next block. Inspectors pressed for statistical results will concentrate on the resident owner, who is a softer target, less knowledgeable, ordinarily, in the ways of the bureaucratic world, and is present, not absent.

This AMICUS is Much Discomfited by a Portion of the FRANK Dissent.

This *amicus*, moreover, draws no comfort whatever from Mr. Justice Douglas' dissent in *Frank*, and the ominous speculation that what is probable cause in a civil matter may be something less than that required in a search for criminal evidence—that it may be merely a lack of inspection for some finite period of time. If this view was observed in Lord Camden's discourse in *Entick v. Carrington*, or in *Boyd*, or in the Fourth Amendment, or in Section 39 of Magna Carta, it is respectfully suggested that it is a view which has never been found there before.

The time for an inspection is not, constitutionally, when there has been no inspection for a period, but only when external manifestations exist which give probably cause to believe that there is an internally contained threat to the public health safety or welfare in the home in question. Otherwise "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men," in the words of Brandeis (in dissent) in Olmstead,[17] should prevail.

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[17] Olmstead v. U.S. 277 U.S. 438, 478

This *amicus* most desperately entreats a reexamination of this *Frank* dictum, as well as of the majority holding, for it's cry is that of the dictum-affected. It is they whose hearts were wrung by *Frank*. Frank ultimately didn't care. His house stood, in glorious abandoned disrepair on Reisterstown Road in Baltimore City for at least three years before being demolished to make way for an equally unlovely used car lot.

Conclusion

This *amicus* urges the Court to find for the Appellant, reversing *Frank* v. *Maryland*.

Respectfully submitted,

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Authoritarianism,
Amicus Curiae

APPENDIX A
EXCERPTS FROM "THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION"

By
NELSON B. LASSON

SERIES LV, NUMBER 2,
STUDIES IN HISTORICAL
AND POLITICAL SCIENCE OF
THE JOHNS HOPKINS PRESS
(1937)

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CHAPTER I
Early Background

• • • • • •

"In the reign of Henry VI (1422-1461), the king granted the Company of Dyers in London the privilege of searching for and seizing cloth dyed with logwood. This was probably the origin of the practice which was subsequently adopted by Parliament and the Court of Star Chamber, of giving general searching powers to certain organized trades in the enforcement of their sundry regulations. Thus, in 1495, Parliament gave the Mayor of London and the wardens of shearmen in London authority 'to enter and search the workmanship of all manner of persons occupying the broad shear, as well as fustians of cloth.' A few years later, in the time of Henry VIII, a statute gave the governing authorities of every city, borough, or town, and the masters and wardens of tallow-chandlers, 'full power and authority to search for all manner of oils brought in to be sold, in whose hands they be, and as often as the case shall require,' *with the right to condemn and destroy* all altered oils and to commit and punish the persons violating the act." pp. 22-23 (Emph. supp).

The Court is respectfully requested to note that this early example of the use of a general warrant was for the exercise of a *civil* remedy, and *not a criminal prosecution.* That is, the purpose was the condemnation and destruction of goods, and not the criminal prosecution of persons.

The historical connection with the eventual adoption of the Fourth Amendment is in a direct line from this statute, as will be shown below, a statute in which, just as in the San Francisco inspection statute, the primary concern is the "general welfare" and health, and not criminal prosecution. (Albeit the welfare is that of the sovereign, and not of the general population.)

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> "The Star Chamber, in conformity with the practice mentioned above, decreed that the wardens of the Stationers' Company or any two members deputed by them should have authority to open all packs and trunks of papers and books brought into the country, to search in any warehouse, shop, or any other place where they suspected a violation of the laws of printing to be taking place, to seize the books printed contrary to law and bring the offenders before the Court of High Commission. This was followed in 1586 by another Star Chamber decree which recited that the various laws and ordinances to regulate printing had been totally unheeded and ineffective and provided for stricter censorship, more rigorous penalties, and similar unlimited powers of search and seizure. It would seem that resistance to such search under the older ordinance had not been unusual. This is indicated by the fact that *it was now found necessary to insert an additional provision severely punishing any opposition to this authority.*" pp.24-25 (Emph. Supp.)

—Just as in *Frank*, and in *Camara* below, there was provision for severe punishment by fining, for resistance to the inspector's authority.

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"No limitations seem to have been observed in giving messengers powers of search and arrest in ferreting out offenders and evidence. Persons and places were not necessarily specified, seizure of papers and effects was indiscriminate, everything was left to the discretion of the bearer of the warrant. Oath and probable cause, of course, had no place in such warrants, which were so general that they could be issued upon the merest rumor with no evidence to support them and indeed for the very purpose of possibly securing some evidence in order to support a charge. To cite one example, a Privy Council warrant was issued in 1596 for the apprehension of a certain printer, upon information 'which maye touché' his allegiance, with authority to search for and seize 'all books, papers, writings, and other things whatsoever that you shall find in his house to be kept unlawfully and offensively, that the same maye serve to discover the offense wherewith he is charged.' " pp. 26-27.

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"In 1629 the Privy Council gave orders, moreover, empowering its messengers to enter into any vessel, house, warehouse, or cellar, search in any trunk or chest and break any bulk whatsoever, and arrest anyone making any speech against his Majesty's service or causing any disturbance. An historian of the period writes that these officers under pretense of searching 'used many oppressions and rogueries, which caused the people still more to exclaim.' The final and natural result of all these arbitrary measures, characteristic of all attempts at law enforcement in the teeth of public feeling, was that the king had little revenue and the people were more dissatisfied than ever.

"General search for documentary evidence was also a prevalent practice during Charles' rule. . .

"The most outstanding of these instances was the case of Sir Edward Coke, the . . . most influential of the Crown's opponents. On the theory that certain works in preparation contained matter prejudicial to the prerogative, that seditious papers were in circulation among the popular party, and that this was an opportune time to discover them and to strike a telling blow, the Privy Council in 1634, when Coke was on his deathbed, sent a messenger to his home with an order to search for 'seditious and dangerous papers.' Practically all of his writings, including the manuscripts of his great legal works, his jewelry, money, and other valuables, and even his will, were seized under that warrant and carried away. His chambers at the Inner Temple were ransacked in the same manner. The havoc wrought by the custodians of these papers was wanton, and seven years elapsed before what remained was restored to his heirs at the request of the Long Parliament. His will, of great importance to his family, was never returned." pp. 30-32.

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"In 1643 an ordinance for the regulation of printing continued the severe censorship and allowed equally broad discretionary powers of search in enforcing its provisions. It was this ordinance which caused Milton to write his Areopagetica, pleading for a free press. . .

"In the colony of Virginia there was passed in 1643 what was probably the first legislative precedent of the Fourth Amendment, prohibiting the issue of blank warrants." Hening, Statutes at Large, I, 257-258. p. 33

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"In the same period, in England, a new form of tax, the excise, was invented and imposed to

raise funds for the war against Charles, carrying with it an unlimited authority of invasion of private homes with which this tax was always later identified by the people. . .

"Many pamphlets appeared, denouncing the excise and the procedure of its enforcement. See citations in William Kennedy, English Taxation (London, 1913), p. 62n. In Excise Anotomiz'd, anonymously published in 1659, the writer lists as one of his grievances: 'The uncivil Proceedings of the Officers thereof, who, upon every suspicion, and often malicious Information, come into our Houses, with armed men, and if not immediately let in, violently break open our Doors, to the great Affrightment and Amazement of our Wives, Children, and Families.' (ed. 1733, p. 15.)" p. 34

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"Incidentally, these statutes were to play leading roles in the events on both sides of the Atlantic that laid the permanent foundation for the principle of reasonable search and seizure. The first was the Licensing Act for the regulation of the press. It made provision for powers of search as broad as any ever granted by Star Chamber decree. The second was an act 'to prevent frauds and abuses in the custom.' One instrumentality to aid in its enforcement was the general writ of assistance. A third statute passed in the same year brought into existence the hated 'hearth money,' in the collection of which officials were given right of entry into all houses any time during the day. . .

"A proclamation was issued by Charles to suppress seditious libels and unlicensed printing and the chief justice, in turn, upon the basis of the proclamation, issued general warrants of search and arrest to enforce it. . .

"When Scroggs was impeached, one of the articles of impeachment was based on his issuance of 'general warrants for attaching the persons and

seising the goods of his majesty's subjects, not named or described particularly, in the said warrants; by means whereof, many . . . have been vexed, their houses entered into, and they themselves grievously oppressed, contrary to law.' Here was a legislative recognition of the idea that general warrants were an arbitrary exercise of government authority against which the public had a right to be safeguarded. . .

"After the Revolution of 1688, another forward step was taken in acknowledgment of this privilege. One of the first acts of the new government, by insistance of King William himself, was to abolish 'hearth-money.' But what is of most interest here is the reason given for this action. The 'hearth-money,' declares the preamble of the statute, is not only a great oppression of the poorer classes, 'but a badge of slavery upon the whole people, exposing every man's house to be entered into, and searched by persons unknown to him.'" pp. 37-39

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"Great opposition was aroused in 1763 when the cider tax was passed, extending the excise laws to a commodity which would bring practically everyone into contact with the administration of these laws. William Pitt spoke against it, particularly against the dangerous precedent of admitting officers of the excise into private houses. The laws of excise were grievous to the trader, he said, but intolerable to the private person. The government admitted that the excise was odious but maintained it was necessary." p. 41

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"In the House of Lords a number of protests were filed by dissenting members 'because by this Bill our fellow subjects, who from the growth of their own orchards, make Cyder and Perry, are subjected to the most grievous mode of excise; whereby private houses of peers, gentlemen, freeholders, and

farmers are made liable to be searched at pleasure." Disturbances broke out in the cider counties and troops had to be moved into them. . .

"Earlier in the same year, 1760, when he was still attorney general and not yet on the bench, Hardwicke had argued with Walpole that the broad powers of search and seizure in enforcing the customs and excise laws were not unreasonable. Parliamentary History, VIII, 1289." P. 42

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"In 1762, John Wilkes, then a member of Parliament, began to publish anonymously his famous series of pamphlets called The North Briton, deriding the ministers and criticizing the policies of the government.

"A warrant was issued by Lord Halifax, the secretary of state, to four messengers, ordering them 'to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers.'

"Here was a warrant, general as to the persons to be arrested and the places to be searched and the papers to be seized. Of course, probable cause upon oath could necessarily have no place in it since the very questions as to whom the messengers should arrest, where they should search, and what they should seize, were given over into their absolute discretion. Under this 'roving commission,' they proceeded to arrest upon suspicion no less than forty-nine persons in three days, even taking some from their beds in the middle of the night. Finally, they apprehended the actual printer of Number 45 and from him they learned that Wilkes was the author of the pamphlet. Wilkes was waiting for just such an opportunity, having on different occasions advised others to resist such warrants. He pro-

nounced the messengers' authority 'a ridiculous warrant against the whole English nation' and refused to obey it.

"All the printers, upon the suggestion and with the support of opponents of the government, brought suit against the messengers for false imprisonment. Chief Justice Pratt held the warrant to be illegal. 'To enter a man's house by virtue of a nameless warrant,' said the Chief Justice, 'in order to procure evidence, is worse then the Spanish Inquisition; a law under which no Englishman would wish to live an hour.' The London jury awarded the particular plaintiffs in the test cases damages of £300 and the other plaintiffs had verdicts of £200 by consent.

"Asked, once by Madame Pompadour how far the liberty of the press extended in England, Wilkes replied: 'I do not know. I am trying to find out.' Raymond Postgate, 'That Devil Wilkes' (London, 1930), p. 53." pp. 43-44

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"'Wilkes and Liberty' became the byword of the times, even in far-away America.

"His correspondence with leading Americans in this period was also considerable." pp. 45-46

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"In 1765, Pratt, now Lord Camden, delivered the opinion of the court, in *Entick v. Carrington*, an opinion which has since been denominated a landmark of English liberty by the Supreme Court of the United States. 'If this point should be decided in favor of the Government,' said the court, this warrant was specific as to the person but general as to papers, 'the secret cabinets and bureaus of every subject in this kindom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.' An un-

reasonable power, the court went on, must have a specific foundation in law in order to be justified. *Boyd v. United States*, 116 U.S. 616, 6 Sup. Ct. 524, 29 L. ed. 746 (1886)." pp. 47-48

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"In April, 1766, the House of Commons resolved that general warrants in cases of libel were illegal. But this limited condemnation did not satisfy Pitt. He forced the House to declare that general warrants were universally invalid, except as specifically provided for by act of Parliament.

"One of Pitt's many eloquent remarks on these occasions, a sample of his great oratorical powers, has become classic." p. 49

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CHAPTER II

Writs of Assistance In The Colonies

"From the standpoint of the more effective enforcement of trade laws, the convenience of general search warrants was very apparent. As pointed out in the preceding chapter, provision had been made for such warrants in like instances in England by the act of Charles II passed in 1662, by virtue of the broad terms of which any person who was authorized by a writ of assistance under the seal of the English Court of Exchequer could take with him a civil officer and search any house, shop, warehouse, etc.; break open doors, chests, packages, in case of resistance; and remove any prohibited or uncustomed goods or merchandise. Furthermore, an act of William III passed in 1696 contained the broad stipulation that the officers of the customs in America were to be given 'the same powers and authorities' and the 'like assistance' that officials had in England.

"These writs, which received their name from the fact that they commanded all officers and subjects of the Crown to assist in their execution, were even more arbitrary in their nature and more open to abuse then the general warrants of the North Briton cases. The warrants in those cases, it is true, authorized the apprehension of undescribed persons and the indiscriminate seizure of their papers, but they were connected with a particular case of libel and consequently were necessarily limited to some extent not only in object, but what is more important in time. In other words, the *warrants were not permanent* in the officers' hands to be used thenceforth to search for and seize the authors of all seditious libels and their papers. The more dangerous element of the writ of assistance, on the other hand, was that it was not returnable at all after execution, but was good as a continuous license and

authority during the whole lifetime of the reigning sovereign." pp. 53-54

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"An examination of the Maryland Archives reveals a colonial writ of assistance of an earlier date than any the writer has seen mentioned before. This writ was issued by the Council of Maryland to Patrick Mein, Surveyor General of the Customs in Virginia and Maryland, on November 10, 1686, in response to his request for a writ of assistance 'as is usual in such cases.' The writ, however, did not recite any general powers of search and its sole purpose was to command assistance, but the fact is evident that the recitation in Mein's commission of general search powers was taken by everyone concerned, to be of itself sufficient authority in this regard. Indeed, the commission itself reads like a general writ of assistance. Archives of Maryland (Baltimore, 1887), V, 521-524.

"Besides the fact of the early date, this material is interesting in several respects. First, it seems to demonstrate that in those early times and for a long time afterwards the officers were permitted to search any time and any place upon the sole authority of their commissions, and that at an early date after the passage of the statute 13 and 14 Char. II (1662) the writ of assistance itself was not looked upon as any authorization of general search. Second, the statute passed in 1672 cited in Mein's commission for his right of general search (25 Char. II, ch. 7) does not appear to give any such power. Third, the date of the incident was ten years before the statute 7 and 8 Wm. III, which purported to give the same authorities to the customs officers in America that those in England had. The general power to search in the commission, accordingly, does not seem to have been based upon any legislative sanction but only upon the authority of the customs administration." pp. 55-56

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"In February of 1761, all writs of assistance expired [due to the death of the sovereign six months before]. Sixty-three Boston merchants immediately petitioned the court for a hearing on the question of granting new writs. The merchants were represented by the younger James Otis.

"Otis completely electrified the large audience in the court room with his denunication of England's whole policy toward the Colonies and with his argument against general warrants. John Adams, then a young man less than twenty-six years of age and not yet admitted to the bar, was a spectator, and many years later described the scene in these oft-quoted words: 'I do say in the most solemn manner, that Mr. Otis's oration against the Writs of Assistance breathed into this nation the breath of life.' He 'was a flame of fire! Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free.'

"Otis contended that since general warrants were not sanctioned by the common law, the writ of assistance mentioned in the act of 1662 should be construed as special like the writ of assistance provided for in the earlier act passed in 1660, especially since the later statute did not give a clear definition of the writ. If this statute, passed in the reign of Charles II when arbitrary power was pushed to an extremity, did authorize general warrants, then, he maintained, it was unconstitutional, repugnant to Magna Carta. And foreshadowing the great principle of American constitutional law, he argued that an act against the Constitution, on the authority of Lord Coke in *Dr. Bonham's Case,* was void.

"Here was an instrument that appeared to him 'the worst instance of arbitrary power, the most destructive of English liberty, that even was found in an English law book.'" pp. 57-59

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"It is usually overlooked that in the very midst of the first few days of July, 1776, just at the moment that 'the child Independence,' to use Adams' phrase, had grown to manhood, when Adams was taking the leading part in putting through the Second Continental Congress the resolution of independence, he fittingly recalled and gave a merited importance to the incident which had done much to inspire his career. 'When I look back to the year 1761,' he wrote to his wife on the morning of July 3, 1776, communicating the news of the action of Congress in passing the resolution, 'and recollect the argument concerning writs of assistance, in the superior court, which I have hitherto considered as the commencement of the controversy between Great Britain and America, and recollect the series of political events, the chain of causes and effects, I am surprised at the suddenness of this revolution.'" p. 61

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"And a short while later, with regard to the Malcom affair in Boston, where the execution of a writ of assistance had been resisted by a merchant, the attorney general and solicitor general advised that no civil action or criminal prosecution could be brought against any of the parties who obstructed the officers inasmuch as the writ of assistance by virtue of which they entered the house and cellar was not a legal authority. Particular care seems to have been taken, however, from obvious motives of prudence and expedience, that these opinions, which in effect held illegal every search and seizure ever made in the Colonies under a writ of assistance, should not reach the public ear. . .

"With his argument in the *Writs of Assistance Case,* Otis had secured his election to the General Assembly by an overwhelming majority and for ten years he was the leading spirit there in bringing on the American Revolution. . .

"John Adams writes: 'On the week of his election I happened to be at Worcester, attending the Court of Common Pleas, of which Brigadier Ruggles was Chief Justice, when the news arrived from Boston of Mr. Otis' election. You can have no idea of the consternation among the government people. Chief Justice Ruggles . . . said, 'Out of this election will arise a damned faction, which will shake this province to its foundation.' Ruggles' foresight reached not beyond his nose. That election has shaken two continents, and will shake all four.' Adams to Tudor, March 29, 1817, Works of John Adams, X, 248." pp. 65-66

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"The whole customs system partook too much of 'burning a barn to roast an Egg,' a procedure naturally annoying, adds James Truslow Adams, to the owner of the barn. J. T. Adams, p. 296, citing Ingersoll Papers, p. 297." p. 68

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"It was not very long before the sincerity of the colonists with respect to general warrants was put to the test and found incapable of standing the strain of extreme circumstances. On August 28, 1777, Congress, then in session in Philadelphia, received information that a large British army had landed at the head of the Chesapeake. It thereupon recommended to the Supreme Executive Council of Pennsylvania the arrest of certain persons, most of them Quakers, who had shown a disposition inimical to the American cause, 'together with all such papers in their possession as may be of a political nature.' Congress also recommended the seizure of the records

and papers of the Meeting of Sufferings, and institution of the Quakers.

"These persons were arrested together with a number of others, many of them citizens of wealth and influence. There was neither trial nor hearing. They were hurried to confinement, their houses were searched, and desks were broken open in a general fishing expedition for compromising papers. Twenty-three of these people who were being detained at Mason's Lodge prepared a remonstrance to the President and Council of Pennsylvania. This interesting document set forth the ninth and tenth sections of the Pennsylvania Declaration of Rights adopted just the year before, the ninth guaranteeing the essentials of a fair trial, and the tenth prohibiting general warrants. It went on to declare that the warrant issued by the Council had authorized the messengers to search all papers on the bare possibility that something political might be found, but without the least ground for a suspicion of the kind. . .

"The whole record bespeaks half-hearted action and the feeling of shameful necessity. The prisoners were ordered sent to Virginia, notwithstanding the issuance of a writ of habeas corpus by Chief Justice McKean, which the state authorities disregarded. . .

"It is exceedingly doubtful that such an occurrence would have taken place in more normal times. But it brings to mind what James Madison said twelve years later, that wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested majority in a democracy than by a powerful and interested prince in a monarchy. . .

"Madison to Jefferson, October 17, 1788, in Writings of James Madison (Gaillard Hunt, ed., New York, 1904), V, 272 ff. 'Experience proves the inefficacy of a bill of rights on those occasions when

its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . .Wherever the real power in a Government lies, there is the danger of oppression.''' pp. 76-78

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CHAPTER III

The Fourth Amendment

"Gerry, writing under the nom de plume 'A Columbian Patriot,' fittingly epitomized this objection for his state in the following interesting passage: 'There is no provision by a bill of rights to guard against the dangerous encroachments of power in too many instances to be named: but I cannot pass over in silence the insecurity in which we are left with regard to warrants unsupported by evidence—the daring experiment of granting writs of assistance in a former arbitrary administration is not yet forgotten in the Massachusetts; nor can we be so ungrateful to the memory of the patriots who counteracted their operation, as so soon after their manly exertions to save us from such a *detestable* instrument of arbitrary power, to subject outselves to the *insolence* of any petty revenue officer to enter our houses, search, insult, and seize at pleasure.' Federalist and Other Constitutional Papers, II, 723. It is interesting to note that the question of search and seizure was the first illustration seized upon by both Less and Gerry as indicative of the necessity of a bill of rights." p. 89

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"[In debate in the Virginia Legislature, on the cutting question of the addition to the Constitution of a Bill of Rights,] Patrick Henry . . . dwelt upon the oppressions of state sheriffs and pointed out the greater possibilities in the case of federal sheriffs acting under distant superiors:

"'When these harpies are aided by excisemen, who may search, at any time, your houses and most secret recesses, will the people bear it? If you think so, you differ from me. Where I thought there was a possibility of such mischiefs, I would grant power with a niggardly hand; and here there is a strong possibility that these oppressions shall actually hap-

pen. I may be told that it is safe to err on that side, because such regulations may be made by Congress as shall restrain these officers, and because laws are made by our representatives, and judged by righteous judges: but, sir as these regulations may be made, so they may not; and many reasons there are to induce a belief that they will not.'" p. 92

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". . .In the present Constitution (of Virginia) they (the authorities) are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of a commission of a fact, etc. There was certainly some celestial influence governing those who deliberated on that Constitution; for they have, with the most cautious and enlightened circumspection, guarded those indefeasible rights which ought ever to be held sacred! The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the General government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure everything you eat, drink, or wear. They ought to be restrained within proper bounds." p. 93

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"Adopted by the Virginia Convention [were a *recommendatory* bill of rights:]

'14th. That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or

describing the place or person, are dangerous, and ought not to be granted." p. 95

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"In Maryland, a committee appointed to prepare amendments adhered closely to the provision in the Maryland Declaration of Rights as regards search and seizure. See note 12, above. A report of the committee's deliberations states the following: 'This amendment was considered indispensable by many of the Committee; for Congress having the power of laying excises (the horror of a free people), by which our dwelling houses, those castles considered so sacred by the English law, will be laid open to the insolence and oppression of office, there could be no constitutional check provided that would prove so effectual a safeguard to our citizens. General warrants, too, the great engine by which power may destroy these individuals who resist usurpation, are also hereby forbidden to those magistrates who are to administer the general government.' Subsequently however, the controlling Federalist majority decided as a matter of policy not to advocate any amendments at all so as to give the approbation of the state the most favorable aspect possible in view of the approaching struggles in the pivotal states. Elliot's Debates, II, 547-556." p. 96

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"On May 4, 1789, four days after Washington's inauguration, Madison had already given notice of his intention to bring up, before Congress, the subject of amendments." p. 98

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"In discussing the matter in Congress, with special references to the 'necessary and proper' clause, he showed the influence of the debate in the Virginia Convention the year before:

. . .'The General Government has a right to pass all laws which shall be necessary to collect its reve-

nue; the means for enforcing the collection are within the discretion of the Legislature; may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.'

". . .It is interesting to note that general warrants were to him the most prominent illustration (as it was to others, e.g., Gerry, note 40, above) of the need of a bill of rights." p. 99

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"The general right of security from unreasonable search and seizure was given a sanction of its own (as finally adopted) and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment.

"Cf. Fraenkel, Harvard Law Review, XXXIV, 366. Cf. also such cases as Boyd v. United States, 116 U.S. 616, 29 L. ed. 746, 6 Sup. Ct. 524 (1886); Hale v. Henkel, 201 U.S. 43, 50 L. ed. 652, 26 Sup. Ct. 370 (1906)." p. 103

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"'The amendments once ratified,' states one writer, 'all notes of opposition were lost in the chorus of admiration that resounded from every quarter. In the worship of the Constitution that instantly succeeded, men forgot that it had been 'extorted from the grinding necessity of a reluctant people.'. . . It was almost impossible to believe that an instrument, accepted by all parties as the last word of

political wisdom, had been produced in a conflict of opinion, adopted with doubt, ratified with hesitation, and amended with difficulty.' Smith, in Jameson's Essays in Constitutional History, pp. 114-115." p. 105

APPENDIX B

Laws of Maryland, Nov. 1789, c. VIII Sec. V

Penalty on selling bread not sufficiently baked, &c.

V. And be it enacted, That if any person or persons whatsoever shall, after the first appointment of assessors in any city or town within their respective counties, make for sale, sell or expose to sale, any of the several sorts of bread aforesaid, within the places aforesaid, which shall not be sufficiently baked, or marked with the mark, and of the weight and fineness, directed by this act, every such person or persons offending in the premises shall forfeit all such bread so deficient in weight or fineness, and not marked as aforesaid; and that it shall and may be lawful to and for the clerk of the market, or such person or persons as the aforesaid assessors shall respectively appoint, at least twice in every month, to examine and weigh all such bread, and to seize, for the use of the poor of the county, all such as they shall find deficient in weight or fineness, and not baked or marked as aforesaid; and if any baker, or other person, shall refuse to suffer the clerk of the market, or the person or persons appointed as aforesaid, to enter his house, or other suspected place, to examine and weigh his bread, he shall forfeit and pay the sum of five pounds current money for every such offence, and the clerk of the market, or person or persons appointed as aforesaid, shall have one third part of such penalty for his trouble, and shall deliver the other two thirds to the overseers, or other managers, of the poor of the place or county where such penalty shall be incurred, for the use of the poor.